

Seeking Truth From Justice

Volume One

PATRIOT Propaganda:

The Justice Department's Campaign to Mislead
The Public About the USA PATRIOT Act

July 2003



www.aclu.org

Seeking Truth From Justice

PATRIOT Propaganda:
The Justice Department's Campaign to Mislead
The Public About the USA PATRIOT Act

Published July 2003

THE AMERICAN CIVIL LIBERTIES UNION is the nation's premier guardian of liberty, working daily in courts, legislatures and communities to defend and preserve the individual rights and freedoms guaranteed by the Constitution and the laws of the United States.

AMERICAN CIVIL LIBERTIES UNION OFFICERS AND DIRECTORS

Nadine Strossen, President
Anthony Romero, Executive Director
Kenneth B. Clark, Chair,
Executive Advisory Council
Richard Zacks, Treasurer



National Office
125 Broad Street, 18th Fl.
New York, NY 10004
(212) 549-2500
www.aclu.org

Washington Legislative Office
1333 H St., NW, 10th Fl.
Washington, DC 20005
(202) 544-1681

Seeking Truth From Justice

Foreword

In April of this year, Maine's *Bangor Daily News* entered the national spotlight when it reported on a small-town librarian's drive to keep the Justice Department from obtaining the borrowing records of her patrons under the increasingly controversial USA PATRIOT Act.

It was a regional human interest story, yet it spurred a high-level spokesman for Attorney General John Ashcroft to call the Bangor paper and claim that a grassroots backlash against parts of the PATRIOT Act amounted to nothing more than a "propaganda campaign," which had consistently got the facts "wrong."

Interestingly, though, when the spokesman, Mark Corallo, berated the paper's editors, *he* misrepresented the scope and impact of the relevant provision in the PATRIOT Act, prompting the editorial board to write a piece complaining that Corallo's characterization "completely overstates the Department's limitations."

The editorial went on to support the librarian's position.

If this was just an isolated incident, it could easily be chalked up to human error or an understandable lapse by a spokesperson at the Justice Department. Unfortunately, the same pattern of behavior – where the Justice Department's critics are answered not with substantive counter arguments, but with often-inaccurate dismissals – is evident in numerous instances, going back almost 20 months.

The following report, titled "Seeking Truth From Justice," is the first volume in a series of ACLU special reports that will catalogue and detail the Justice Department's seeming inability to get its facts straight. This report is part of a series of ACLU special publications examining government policies since September 11. Each of the reports – *The Dangers of Domestic Spying By Federal Law Enforcement* (January 2002), *Insatiable Appetite* (April 2002), *Civil Liberties After 9/11* (September 2002), *Bigger Monster, Weaker Chains* (January

2003), *Freedom Under Fire: Dissent in Post-9/11 America* (May 2003) and *Independence Day 2003: Main Street America Fights the Government's Insatiable Appetite for New Powers* (July 2003) – is available on our website at <http://www.aclu.org/safeandfree>.

As you will see, the errors documented in this report go beyond mere legal hair splitting; rather, they deal with core constitutional values like due process or Fourth Amendment protections against unreasonable search and seizure. They also raise serious questions about whether our leaders in Washington are intentionally misrepresenting the facts of a debate to deflect public or political criticism.

Take, for instance, the U.S. Attorney for Alaska's testimony in front of a state Senate Committee: "I think, for instance, there is concern that under the PATRIOT Act, federal agents are now able to review library records and books checked out by U.S. citizens," he said. "If you read the Act, that's absolutely not true.... It can't be for U.S. citizens."

In fact, the U.S. Attorney was wrong. Section 215 of the USA PATRIOT Act – reproduced in the first section of this report – makes it clear that "U.S. persons," a term referring to citizens and certain types of non-citizens alike, can have their records seized.

That is but one example of the misleading statements that Justice Department officials and supporters of the USA PATRIOT Act have made in recent months. Our report details others and we plan future reports looking at other ways the government is misleading the American public.

Is the Justice Department telling the truth? You decide.

LAURA W. MURPHY
DIRECTOR, ACLU WASHINGTON
LEGISLATIVE OFFICE

July 9, 2003

Seeking Truth From Justice

Seeking Truth From Justice

PATRIOT Propaganda:

The Justice Department's Campaign to Mislead The Public About the USA Patriot Act

In recent months, citizen concern about the USA PATRIOT Act has continued to climb to new highs. More than 130 communities across the country – and state legislatures in Alaska, Hawaii and Vermont – have passed resolutions opposing provisions of the PATRIOT Act and other government actions that compromise civil liberties. And librarians have begun taking steps to warn patrons about and protect them from the Act's dangerously overbroad powers.

Unfortunately, the Department of Justice under Attorney General John Ashcroft has responded to this movement by trying to mislead the American people about the Act's new powers. Department spokespersons have consistently made statements to the media and local officials that are either half-truths or are plainly and demonstrably false – and which are recognized as false by the Justice Department in its own documents.

Primarily at issue is Section 215 of the PATRIOT Act, the so-called “business records” or “tangible things” provision. Section 215 allows the government to obtain – without an ordinary criminal subpoena or search warrant and without probable cause – an order from a court giving them records on clients or customers from libraries, bookstores, doctors, universities, Internet service providers and other public entities and private sector businesses. The Act also imposes a gag order prohibiting an organization forced to turn over records from disclosing the search to their clients, customers or anyone else. The result is vastly expanded gov-

ernment power to rifle through individuals' finances, medical histories, Internet usage, bookstore purchases, library usage, school records, travel patterns or through records of any other activity.

The debate over the PATRIOT Act comes at a time when the Justice Department is not only pushing Congress to remove “sunset” or expiration provisions that apply to some portions of the Act, but is also planning to ask Congress for passage of new legislation – dubbed “PATRIOT II” – that would give federal law enforcement authorities even more expansive powers. In testimony before the House Judiciary Committee on June 5, Attorney General Ashcroft testified that the new powers would include expansions of the offense of “material support” for terrorism, which under overbroad definitions of terrorism in the original PATRIOT Act could be applied to political protesters, and an expansion of presumptive, pre-trial detention – even after the Department's own Inspector General found widespread mistreatment of detainees wrongly classified as terror suspects.

It is troubling that in its eagerness to prepare a foundation for new surveillance and other powers, the Justice Department has resorted to spreading falsehoods and half-truths about the powers it already has.

The following report lays out a series of “falsehoods” and “half-truths” that Justice Department officials have consistently made in the media as well as in letters to lawmakers and provides the facts to counter each.

Seeking Truth From Justice

FALSEHOOD: The PATRIOT Act does not apply to Americans.

What the government has been saying:

“This is limited only to foreign intelligence,” said Mark Corallo, a spokesman with the Department of Justice. “U.S. citizens cannot be investigated under this act.”

— *Florida Today*
Sept. 23, 2002

Mark Corallo, Justice Department spokesman, said Wednesday that critics of the USA Patriot Act were “completely wrong” and denied that the act targeted Americans. ...

“I don’t know why they are misleading the public, but they are,” he said of the act’s critics Thursday. “The fact is the FBI can’t get your records.”

— *Bangor [ME] Daily News*
April 4, 2003

“And I have prepared ... this handy chart that takes the actual text of section 215 and explains the requirement for court authorization, the requirement that it not – it is not directed at US Persons, the requirement that it cannot be directed solely at First Amendment activities. ...”

“The public has I think been misled, and this is the myth versus the reality of section 215.”

— *Viet Dinh, Assistant Attorney General, primary author of the PATRIOT Act, speaking at the National Press Club, Washington D.C., April 24, 2003*¹

“I think, for instance, there is concern that under the PATRIOT Act, federal agents are now able to review library records and books checked out by U.S. citizens. If you read the Act, that’s absolutely not true.... It can’t be for U.S. citizens.”

— *Testimony of Timothy Burgess, U.S. Attorney for Alaska, before the Alaska Senate State Affairs Committee on May 13, 2003*

TRUTH: Section 215 of the PATRIOT Act can be used against American citizens.

Claims that Section 215 of the PATRIOT Act cannot be used against American citizens are simply wrong. According to the text of the Foreign Intelligence Surveillance Act as it was amended by Section 215:

(a)(1) The Director of the Federal Bureau of Investigation or a designee of the Director (whose rank shall be no lower than Assistant Special Agent in Charge) may make an application for an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a *United States person* is not conducted solely upon the basis of activities protected by the First Amendment to the Constitution.

¹ Video of Dinh’s remarks is available online at www.c-span.org. “Viet Dinh & Marc Rotenberg Debate Patriot Act,” April 24, 2003.

Seeking Truth From Justice

Nowhere does this statute indicate that United States citizens cannot be targeted. In fact, the statute makes it clear that an “investigation of a United States person” *can* be conducted, so long as it is not based solely on activity protected by the First Amendment. (Of course, even this limit apparently applies only where the *investigation* is of a United States person, not where the investigation is of a foreign national but the records or other tangible things that the government seeks are of United States persons). The statute defines “United States persons” to include both citizens and permanent residents. (See 50 U.S.C. § 1801(i).)

FALSEHOOD: Under the PATRIOT Act, the FBI cannot obtain a person’s records unless it has probable cause.

What the government has been saying:

“I really don’t understand what the concerns are with the act,” [LaRae] Quy [spokeswoman for the San Francisco FBI office] said. “What it did was primarily streamline existing laws on the books. I know some people feel their privacy rights are being violated, but I think there’s some hysteria out there. . . some misunderstanding.

“We still have to show probable cause for any actions we take,” she said.

— *San Francisco Chronicle*
April 13, 2003

The Justice Department spokesman, Mark Corallo, says the assertions

about the Act are completely wrong because, for the FBI to check on a citizen’s reading habits, it must get a search warrant. And to get a warrant, it must convince a judge “there is probable cause that the person you are seeking the information for is a terrorist or a foreign spy.”

— *Bangor [ME] Daily News*
April 9, 2003

U.S. Department of Justice spokesman Mark C. Corallo said the FBI must present credible evidence in order to secure a warrant from the so-called spy court, which meets in secret.

“The standard of proof before the court is the same as it’s always been,” Corallo said. “It’s not been lessened.”

— *Springfield [MA] Union-News*
January 12, 2003

TRUTH: Section 215 of the PATRIOT Act allows the government to obtain materials like library records without probable cause.

Under the PATRIOT Act, the FBI can obtain records – including library circulation records – merely by specifying to a court that the records are “sought for” an ongoing investigation. That standard (sometimes called a “relevance” standard) is much lower than the standard required by the Fourth Amendment, which ordinarily prohibits the government from conducting intrusive searches unless it has probable cause to believe that the target of

Seeking Truth From Justice

the investigation is engaged in criminal activity.

Although the Justice Department is assuring the public that it remains constrained by the standard of probable cause and that the standard “is the same as it’s always been,” the government has been telling a different story to its own attorneys. For example, an October 26, 2001 memo to “All Divisions” from the FBI’s Office of General Counsel (and approved by FBI Director Robert S. Mueller III) included a section on “Changes in FISA Business Records Authority”:

The field may continue to request business records orders through FBIHQ in the established manner. However, such requests may now seek production of any relevant information, and need only contain information establishing such relevance.

Similarly, in a December 2002 letter to Congress responding to questions posed by the Senate Judiciary Committee, Deputy Attorney General Larry D. Thompson wrote:

Under the old language, the FISA Court would issue an order compelling the production of certain defined categories of business records upon a showing of relevance and “specific and articulable facts” giving reason to believe that the person to whom the records related was an agent of a foreign power. The USA PATRIOT Act changed the standard to simple relevance.

Finally, at a hearing before the House Judiciary Committee on June 5, 2003, Attorney General Ashcroft conceded that the PATRIOT Act changed the FISA business records standard, saying the government “used to have [to allege] a reason to believe that the target is an agent of a foreign power” – a standard he agreed was “lower than probable cause.” Under the PATRIOT Act, he acknowledged, the standard has changed to allow the government may obtain all “relevant, tangible items” without such a showing [see below].

Ashcroft’s testimony and these internal memoranda get the law exactly right. They acknowledge, as they must, that the FBI can now obtain sensitive business records merely by telling a court that the records are sought for an ongoing investigation; that is, the FBI can obtain the records even if they have no reason at all to believe that the person to whom the records pertain is a criminal or foreign spy. The Department’s contention that Section 215 can’t be used without probable cause misleads the public and ignores the government’s own legal analysis.

HALF TRUTH: The government must “convince a judge” to obtain records under Section 215.

The Justice Department’s repeated assertion that the authorities must “convince a judge” to win permission for a search also overstates the law’s protections. Section 215 states:

Seeking Truth From Justice

(c)(1) Upon an application made pursuant to this section, the judge shall enter an ex parte order as requested, or as modified, approving the release of records if the judge finds that the application meets the requirements of this section.

This language suggests that the government must only certify to a judge – with no need for evidence or proof – that such a search meets the statute’s broad criteria: “upon an application” the judge “shall enter” a surveillance order. Although the statute is not clear and has not yet been tested in court, it appears that the judge may not even have the authority to reject an application, unless the application fails to meet “the requirements of this section.” What are those requirements?

FULL TRUTH: Judicial oversight is minimal.

As we have seen, the requirements are minimal. The FBI can obtain sensitive records merely by specifying that the records are “sought for” an on-going investigation. For Justice Department spokespersons to stress the need to “convince a judge” does not do justice to the true weakness of judicial oversight in this law.

FALSEHOOD: Section 215 applies only to terrorists and spies.

What the government has been saying:

Justice Department spokesman Mark Corallo called [librarians’ measures against the PATRIOT Act] “absurd.” The legislation “doesn’t apply to the average American,” he

said. “It’s only for people who are spying or members of a terrorist organization.”

— *Journal News [NY]*
April 13, 2003

Before demanding records from a library or bookstore under the Patriot Act, he [Corallo] said, “one has to convince a judge that the person for whom you’re seeking a warrant is a spy or a member of a terrorist organization.”

— *San Francisco Chronicle*
March 10, 2003

Corallo pointed out that the law only applies to agents of a foreign power or a member of a terrorist organization.

— *Associated Press*
March 6, 2003

I think there are a lot of misconceptions being offered about what the PATRIOT Act does or doesn’t do. ...It has to be in regards to an international terrorism investigation after a court approves us seeking those records.

— *Testimony of Timothy Burgess,*
U.S. Attorney for Alaska before the
Alaska Senate State Affairs
Committee, May 13, 2003

TRUTH: Section 215 can be applied to anyone.

Once again, the spokesperson’s statements are flat wrong. While some provisions of FISA do require a showing that a target is

Seeking Truth From Justice

an “agent of a foreign power,” there is no such requirement in Section 215.

All the government needs to do to conduct a search under Section 215 is “specify” that the records are “sought for” an ongoing terrorism or foreign intelligence investigation. The government need not show that the target of the Section 215 order is engaged in terrorism or criminal activity of any kind.

Attorney General Ashcroft acknowledged as much in testimony before the House Judiciary Committee on June 5, 2003, under questioning by Rep. Tammy Baldwin (D-WI):

BALDWIN: Prior to the enactment of the USA PATRIOT Act, a FISA order for business records related only to common carriers, accommodations, storage facilities and vehicle rentals. Is that correct?

ASHCROFT: Yes, it is.

BALDWIN: And what was the evidentiary standard for obtaining that court order?

ASHCROFT: I don't think the evidentiary standard has changed. . . . [crosstalk] *OK, maybe it has. It used to have [to show] a reason to believe that the target is an agent of a foreign power [emphasis added]...*

BALDWIN: OK. Now, under section 215 of the USA PATRIOT Act, now

the government can obtain any relevant, tangible items. Is that correct?

ASHCROFT: I think they are authorized to ask for relevant, tangible items.

BALDWIN: And so that would include things like book purchase records?

ASHCROFT: ... [I]n the narrow arena in which they are authorized to ask, yes.

BALDWIN: A library book or computer records?

ASHCROFT: I think it could include a library book or computer records.

BALDWIN: Education records?

ASHCROFT: I think there are some education records that would be susceptible to demand under the court supervision of FISA, yes.

BALDWIN: Genetic information?

ASHCROFT: . . . I think [we] probably could.

BALDWIN: Under the PATRIOT Act, what is the evidentiary standard for the FISA court order to obtain these sorts of records?

Seeking Truth From Justice

ASHCROFT: ... [I]f the judge finds that the investigation is for these [counter-intelligence or counter-terrorism] purposes, *he orders the FISA*. [emphasis supplied] ...

Exactly right. Before the USA PATRIOT Act, government agents could get *some* business records under FISA if they had “reason to believe” the person to whom the records related was an agent of a foreign power; now, as the Attorney General makes clear, they can get any record or other “tangible thing” that is allegedly relevant to an investigation regardless of whether the information pertains to an agent of a foreign power.

The implications of Section 215’s weak evidentiary standard are frightening. The FBI can now conduct investigations using this power even when it has no particular individual in mind. For example, the FBI could demand the records of every person who has checked out a book on bridges based on no more than its investigation of a vague, unsubstantiated tip. The Department’s suggestions that only spies or terrorists need worry about the PATRIOT Act couldn’t be farther from the truth.

FALSEHOOD: The American people can trust the authorities not to abuse their powers.

What the government has been saying:

“We don’t have any interest in looking at the book preferences of Americans. We don’t care, and it would be an incredible waste of our time,” he [Corallo] said.

— *Chicago Tribune*
April 4, 2003

The Justice Department “goes to great lengths to protect the privacy of every American unless you happen to be a foreign spy or member of a terrorism organization,” said spokesman Mark Corallo. “The average American has nothing to fear.”

— *Newark Star-Ledger*
April 7, 2003

“We’re not going after the average American,” said Mark Corallo, a Justice Department spokesman. “We’re only going after the bad guys. We respect the right to privacy. If you’re not a terrorist or a spy, you have nothing to worry about.”

— *Washington Post*
April 10, 2003

TRUTH: Democratic societies are based on checks and balances, not on blind faith in the good intentions of government officials.

With all due respect to the Justice Department, it is not enough for the government to *assure* us that they “go to great lengths to protect” privacy, “don’t have any interest” in spying on innocent people, and are “not going after” the average American. The wisdom of the Founding Fathers, the historical record of abuses by the FBI, and common sense all point to the same conclusion: we can’t rely on the FBI or any other federal law enforcement agency to police itself.

In June, for example, the Justice Department’s own internal oversight unit released a report highly critical of what it

Seeking Truth From Justice

found to be the wholesale and long-term preventive detention of immigrants swept up in the months following 9/11. According to the report issued by the Justice Department's Inspector General, many immigrants who had no connection to the terrorist attacks of September 11 languished in federal lock-up for months at a time under an official "no bond policy" that effectively prohibited their release. The INS complained that the FBI had given them no evidence to justify their continued detention, yet some immigrants still spent up to eight months waiting for release.

Conclusion: A pattern of deceit

It is time for the Department of Justice to stop misleading the American people. The public cannot make informed decisions about the future of the police powers contained in the PATRIOT Act – whether to let them expire, renew them, or expand them even more with PATRIOT Act II – if the government is not truthful about the extent of its current powers.

And the falsehoods are not limited to the PATRIOT Act. In a letter to the City Clerk of Ithaca, the FBI's Keith A. Devincentis, Special Agent in Charge of the Bureau's Albany office, misstates the FBI's powers under the Attorney General guidelines on domestic surveillance. "Contrary to popular television and theatrical portrayals, the FBI initiates cases predicted on facts, not suspicions or guesswork. 'Fishing expeditions' are clearly proscribed by FBI policy, Attorney General Guidelines, and other Federal statutes and regulations," Devincentis wrote.

In fact, in the aftermath of the passage of the USA PATRIOT Act, on May 30, 2002, Attorney General John Ashcroft announced that he had rewritten the guidelines that govern FBI surveillance. The Ashcroft guidelines sever the tie between the start of an investigative activities and evidence of a crime. Ashcroft's guidelines give the FBI a green light to send undercover agents or informants to spy on worship services, political demonstrations and other public gatherings and in the Internet chat rooms without even the slightest evidence that wrongdoing is afoot. Contrary to what Devincentis wrote, the FBI is now very much empowered to conduct investigative "fishing expeditions" on First Amendment protected activities even though there is no indication of criminal activity.

At this moment, the Justice Department has clear political incentives to soft-pedal the nature of the PATRIOT Act. But we can count on the fact that government investigators and prosecutors, when they appear before judges, will be making much bolder claims about what the Act lets them do.

Some Americans might have a hard time believing that a Justice Department spokesperson could be inaccurate about basic matters of law with such flagrancy. The ACLU has certainly found that from time to time it is possible to make occasional errors about matters of law, or to be misunderstood by a reporter when discussing the law. In this case, however, we are witnessing a pattern of inaccuracy spread out over a long period of time, over a wide variety of news outlets, by various staff members, on a central issue in a prominent national debate.

Seeking Truth From Justice

The Department's inaccuracies have to do not with subtle, debatable points of legal interpretation, but clear matters of law that are spelled out in black and white in the text of the PATRIOT Act.

There is no excuse for the Justice Department to get the PATRIOT Act wrong; the Department was behind the legislation from the beginning. The Justice Department drafted the Act (most of the Act's surveillance provisions were part of a longstanding wish list that had

previously been sought by the Justice Department but rejected by Congress), and the Department was instrumental in forcing the bill through Congress with minimal discussion or debate in the panicked weeks after 9/11.

Considering the extent to which the USA PATRIOT Act is the Ashcroft Justice Department's "baby," one might expect department officials to be proud parents. Instead, they seem intent on denying the true nature of their creation.



National Office

125 Broad Street, 18th Fl.
New York, NY 10004
(212) 549-2500
www.aclu.org

Washington Legislative Office

1333 H St., NW, 10th Fl.
Washington, DC 20005
(202) 544-1681